Supreme Court, U.S.
FILED
OCT 2 1995
OFFICE OF THE CLERK

(2)

No. 95-409

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

PROMETHEUS FUNDING CORP., etc., et al.,
Petitioners,
vs.
MERCHANTS HOME DELIVERY SERVICE, INC.,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

Under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) ("MFA") which provides in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance":

1. Do civil remedies in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") "invalidate, impair or supersede" California's Unfair Insurance Practices Act, Cal. Ins. Code § 790 *et seq.* ("UIPA") because RICO's remedies are more severe than the civil remedies found in California law and is this question governed by state or reverse preemption of the field of insurance regulation or by traditional principles of implied federal preemption?

2. If RICO claims invalidate, impair or supersede the UIPA, are the following practices within the "business of insurance": fraud in taking money (a) for nonexistent insurance, (b) on fraudulently inflated premiums for actual insurance, and/or (c) for false claims?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

DISCLOSURE AS TO RESPONDENT

Per rule 29.6, respondent discloses that National Freight Consortium, plc ultimately owns Merchants Home Delivery Service, Inc., a California corporation ("Merchants") through its other wholly-owned subsidiaries (namely, NFC International Holdings (Netherlands), Inc. which owns NFC International Holdings (USA), Inc. which owns Merchants). All subsidiaries of Merchants are wholly-owned by Merchants.

STATEMENT OF THE CASE

Merchants filed a civil action in the United States District Court, Central District of California, alleging civil RICO claims against its former broker, Frank B. Hall & Co., Inc. and associated defendants (collectively "Hall"), through which Merchants bought insurance.[1] (First Amended Complaint, Appellant's Excerpts of Record filed with the Court of Appeals for the Ninth Circuit, "ER" 1-74).

Merchants alleges that Hall stole at least $1.5 million in three ways (the "challenged practices"), taking Merchants' money *(1)* for the purchase of policies which were *never purchased* (ER 17-23, 31), *(2)* for premiums of actual policies which were *fraudulently marked up* in excess of the actual premiums set by underwriters (ER 17-18, 23-24) and *(3)* for *phony claims* (ER 17-18).[2]

Hall moved for judgment on the pleadings, arguing that the MFA expressly precluded federal civil claims as to the business of insurance. The district court granted that motion. (ER 179-189)

The Court of Appeals *unanimously* reversed and remanded. (Pet. App. 14a-25a) Thereafter, the Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. (Pet. App. 13a) The Court

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[1] For the text of RICO, see Pet. App. 26a.

[2] Merchants discovered other thefts and frauds in the state case (after judgment was entered in the federal case). This is a proper concern here in that judgment on the pleadings may be granted only if no set of facts entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Those additional frauds include (a) Hall's fraudulent conversion of trust funds to its own use including refunds not credited to Merchants and (b) other fraudulent compensation not disclosed to Merchants including commissions (since Merchants was to pay a "wholesale" price, i.e., no commissions) and interest on Merchants' money (in that Merchants was to get the cash flow benefits).

of Appeals applied a four part inquiry approved by this Court, focusing on the two contested questions. (Pet. App. 17a)

The first contested question below was whether the challenged practices constitute the "business of insurance." The Court of Appeals noted that the collection of premiums for phony policies does not spread any risk, does not create a relationship between insured and insurer and is not limited to entities in the insurance trade. Similarly, collection of money for phony claims is not the "business of insurance." Thus, Merchants could prosecute claims as to two of the three challenged practices (i.e., phony insurance and phony claims) irrespective of the answer to the second contested question. However, since one of the three practices was held to be the "business of insurance," the Court of Appeals needed to answer the second contested question.

The second contested question below was whether RICO "invalidates, impairs or supersedes" the UIPA.[3] The Court of Appeals agreed with the only other circuit court to address the standard for determining this prong of the MFA, *NAACP v. Amer. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S. Ct. 2335 (1993). The Court determined that the MFA did not completely abandon the field to the states and applied the "direct conflict" test traditionally used in cases of implied preemption, i.e., whether the federal law directly conflicted with the state law. (Pet. App. 23-25a) Since both federal and state law prohibit the challenged acts, the Court of Appeals concluded that there was no conflict and that RICO does not "invalidate, impair or supersede" California

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[3]For the text of the UIPA, see Pet. App. 27a-39a.

The question whether federal law "invalidates, impairs or supersedes" state law may dispose of the entire appeal. For that reason, this brief presents that question first (as does the Petition), i.e., reversing the order of questions in the Court of Appeals' decision.

law regulating insurance (Pet. App. 25a), so that Merchants may bring RICO claims based on each of the three challenged practices.

REASONS FOR DENYING THE PETITION

This Court has the tremendous benefit of receiving the position of the state regulators, who agree with the Court of Appeals' decision and vigorously oppose the petition, through their National Association of Insurance Commissioners ("NAIC"), the creator of the very Model Act on which California's UIPA is based.[4]

The petition should be denied for numerous reasons. The most fundamental reason is that no proper basis exists for this Court's discretionary review. There is no conflict between the circuit courts or between a circuit court and any state's highest court. Moreover, this Court either has previously addressed the question presented or the question involves facts highly specific to this case.

Second, the MFA did not create reverse "field preemption;" rather, as this Court noted in at least two decisions concerning the MFA, traditional federal preemption rules apply. The proper test under implied preemption is whether there is an "actual conflict" between RICO and state law. Based on no fewer than four (4) recent decisions of this Court, a difference in remedies does not create an "actual conflict."

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[4]NAIC filed an amicus brief below in support of Merchants' position and indicated that it also intends to file an amicus brief here.

Merchants urges this Court to first review the NAIC's brief and especially its description of the reliance by the various state insurance commissioners on RICO and on federal prosecutions to curb fraud in the business of insurance. It would be tragic if the wishes of the state regulators were disregarded in the name of the MFA's promotion of state regulation of insurance.

Third, the issue whether the challenged practices constitute the "business of insurance" (a) is moot since RICO and the UIPA coexist without actual conflict, and (b) is entirely case specific so as not to merit this Court's attention.

Fourth, the field preemption proposed by Hall is dangerous in that it would (a) bar criminal RICO prosecution as well as civil RICO prosecution, (b) bar all federal action whether based on interstate commerce, control of the mails or other federal function, and (c) create unnecessary legal complications as to choice of law, jurisdiction and venue where the fraud is truly interstate.[5] The MFA simply does not provide such gratuitous immunity for fraud in the insurance industry.

I.

THERE IS NO PROPER BASIS FOR REVIEW.

This Court's own rules shows that this case is inappropriate for review. Sup. Ct. R. 10. The principal basis for review — a conflict between the circuit courts — does not exist here. By only citing conflicting decisions in *district* and *intermediate state* courts (Pet. 13), the petition highlights its own inappropriateness.[6]

Instead, apparently under Rule 10(c), the Petition purports to present issues of "nationwide importance implicating paramount federal statutory policies." (Pet. 8) Setting

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[5]There is a question whether California regulation could reach all of the fraud since more than $1 million of Merchants' funds went to Hall's Texas subsidiary.

[6]The divergence of opinion is based on the failure by those courts to apply this Court's preemption analysis. The lower courts now have guidance from the Court of Appeals' decision and can correctly decide future cases.

aside the fact that every petitioner probably considers their position to be one of nationwide importance, Hall has not cited standards by which the nationwide importance of its petition can be measured.[7] The argument also ignores Rule 10(c) which limits review to questions which have not been but should be decided by this Court. The questions here either have been decided by, or are inappropriate for, this Court.

This Court previously declined *certiorari* on the very issue presented here, namely whether civil RICO was barred by the MFA. *American Int'l. Group, Inc. v. Superior Court*, 285 Cal. Rptr. 765 (Ct. App. 1991), *cert. denied, Brutoco Eng. & Const. v. American Int'l. Group, Inc.*, 504 U.S. 911 (1992).[8] There are no new circumstances to justify a change in the Court's position. In addition, by declining *certiorari* in *NAACP*, this Court correctly declined to revisit the standard for implied preemption cases, namely whether there is a direct conflict between the federal and state laws.

The question whether federal law "invalidates, impairs or supersedes" state law, has no greater urgency now than when this Court denied *certiorari* in *NAACP* and *Brutoco*. If there was ever any confusion on this topic, this Court cleared it up in its most recent decision on the MFA, *U.S. Dept. of Treas. v. Fabe* ____U.S.____, 113 S. Ct. 2202, 2211 (1993), by holding that federal and state laws coexist except to the extent of a direct conflict. Moreover, the question whether differences in federal and state remedies constitute

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[7] Hall's argument as to increase in litigation and product cost undoubtedly are common arguments to this Court and hardly show "nationwide importance."

[8] *AIG* was not only wrongly decided but presented an even better case for *certiorari* for its complete disregard of preemption law. Here, the Court of Appeals applied preemption law. Any complaint that the Court of Appeals incorrectly applied that law is a disfavored basis for *certiorari*. Sup. Ct. R. 10.

an actual conflict has been answered by this Court in at least four (4) recent decisions.

The question whether the challenged practices constitute the "business of insurance," involves facts specific to this case rather than a matter of national importance. In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), this Court provided the analysis to help lower courts with this topic and there is no need for this Court to review each application of *Pireno*'s analysis.

As this Court has previously pointed out, any displacement of civil RICO will also displace criminal RICO. *English v. General Elec. Co.*, 496 U.S. 72, 83 (1990) ("Acceptance of respondent's argument would require us to conclude that Congress has displaced not only state tort law, which is at issue in this case but also state *criminal* law.") Thus the limits on civil RICO demanded by Hall would also tie the hands of federal criminal authorities in prosecuting fraud in the "business of insurance."

The floodgates argument (i.e., that substantially more RICO cases will now be filed than if Hall's position were accepted) (Pet. 20) is factually wrong and constitutionally inappropriate. Since this Court's careful clarification of the "pattern" requirement in RICO set forth in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), the number of RICO filings has declined. *See* Admin. Office of the U.S. Courts, 1992 Annual Report at Table C-A2 (there were *1129* RICO filings out of 225,811 filings in 1989 and *897* out of 230,503 in 1992); Resp. App. 1a. Moreover, as this Court also noted in *H.J.*, if RICO is to be further restricted, "it is a job for Congress." *H.J.*, 492 U.S. at 249.

This Court need go no further in this brief for reasons to deny the Petition. It need not burden itself with review of each application of its decisions. There are no new or emergency circumstances to justify a change of existing

preemption principles. There is no split of authority which would justify review under this Court's own rules. Simply, review would be a unjustifiable waste of this Court's time.

II.

RICO'S CIVIL REMEDIES DO NOT INVALIDATE, IMPAIR OR SUPERSEDE THE UIPA.

A. Federal Law Yields To State Insurance Regulation Only To The Extent Of An Actual Conflict.

Hall asserts that the Court of Appeals applied an incorrect standard (namely the actual conflict standard used in implied preemption cases), that "this Court has never said that such an actual or direct conflict is needed to come within McCarran-Ferguson" (Pet. 8) and that the MFA created "state law preemption of federal law" (Pet. 8-9).[9] In essence, Hall interprets the MFA as creating a new type of preemption, never before recognized by this Court, in the form of a reverse field preemption — that state law regulating any part of the business of insurance ousts all federal law from that entire field. (*Compare* Pet. 9, "states have primary jurisdiction" and "state law preemption of federal

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[9]This argument represents an extreme retreat in Hall's position. According to the District Court and Hall, there was an actual conflict between RICO and California law. RICO's remedies (treble damages and attorneys' fees) would, according to the District Court, "supersede the state remedies," (Pet. App. 10a) and would according to Hall, "upset the balance struck by California's insurance code" (Pet. 23a).

After Merchants cited below no less than four decisions of this Court that different remedies do not create a conflict under preemption law, Hall retreated from its previous position (that the difference in remedies created a conflict) to now argue that "actual conflict" is not required and that the MFA created a novel type of reverse field preemption.

law"). The Court of Appeals agreed that Hall was advocating a reverse field preemption:

> This argument amounts to the contention that Congress intended the McCarran-Ferguson Act to allow states to *preempt the field* in the regulation of the business of insurance.

Pet. 23a (emph. added).

As shown below, under this Court's decisions, the field preemption argument is clearly incorrect. Pursuant to traditional principles of implied preemption, federal law is only ousted where it actually or directly conflicts with state law. The correct statement of the operation of the MFA is that it allows the states to regulate insurance, allows Congress to apply any law to the business of insurance except that to the extent that the federal and state laws conflict, federal law must yield.[10]

Hall cited *FTC v. National Cas. Co.*, 357 U.S. 560, 563-64 (1958) in support of its position that federal law may not even supplement state law regulating the business of insurance (Pet. 10-11) and that an actual conflict between federal and state law is not required to invoke the MFA (Pet. 19). *FTC* is not at all appropriate here since *FTC* is based on a *different* portion of the MFA as seen below:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insur-

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[10] In addition, under the MFA, a federal law may "specifically relate[ ] to the business of insurance", in which case Congress apparently can still preempt the state regulation. While RICO does not specifically relate to the business of insurance (and thus does not preempt state law in the event of a conflict), this part of the MFA helps to show that the MFA did not create reverse field preemption, as further explained below.

> ance: *Provided*, That after June 30, 1948, * * * the Sherman Act, * * * the Clayton Act, and * * * the *Federal Trade Commission Act* * * * shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b) (emph. added).

The Federal Trade Commission is subject to the second sentence (the proviso); it may regulate only "to the extent that such business is not regulated by State law." *Id.* In contrast, this case is subject to the first sentence so that RICO may not "be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance." *Id.* The two sentences significantly differ in obvious ways.[11] The first sentence requires a determination of whether the federal law "invalidates, impairs or supersedes" the state law.[12] The proviso does not require such a determination. It is thus highly

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[11] Hall itself recognized a "significant difference" between the two sentences of the MFA. (Pet. 23)

[12] The phrase "invalidates, impairs or supersedes" is meaningless unless it requires some scrutiny of the interplay between the federal and state laws.

If the MFA created field preemption, the first sentence would read like the proviso — without the phrase "invalidates, impairs or supersedes".

If the MFA allowed no differences between federal and state laws, then it would have created an express preemption — that the federal government could not regulate the business of insurance at all. Yet the MFA does not so read.

The standard under the MFA is necessarily one of implied preemption which allows the statutes to coexist absent a conflict. The words themselves — invalidate, impair and supersede — focus on whether there is a conflict and do not provide for either field preemption or express preemption.

inappropriate for Hall to argue that *FTC* applies here.[13] Significantly, this Court did not even mention *FTC* in *Fabe*, its most recent decision on the MFA.

Hall also cited *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) to support its argument that the MFA created field preemption. (Pet. 10) In *SEC*, the Arizona Insurance Commissioner *approved* a merger involving an insurance company which the SEC then sought to *unwind* (along with other remedies) for violations of federal securities laws (including Rule 10b-5). Recognizing that regulation of an activity may come from multiple government agencies, this Court rejected the insurance company's position as follows:

> [Respondents] contend that any attempt to interfere with a merger approved by state insurance officials would "invalidate, impair or supersede" the state insurance laws made paramount by the McCarran-Ferguson Act. We cannot accept this overly broad restriction on federal power.
>
> It is clear that any "impairment" in this case is a most indirect one.... Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so.... The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the para-

[13] Moreover, *FTC* is a terse, three-page, forty-year-old decision which predates, and thus could not apply, the four-prong test (first developed in *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979)) which all parties agree was properly used in this case. The very terseness of the decision reflects the simple nature of the single issue before the court — whether the state regulated insurance. Moreover, *FTC* concerned apples and apples (actual regulation by both federal and state governments) whereas this case involves apples and oranges (state insurance regulation and citizens' civil remedies against racketeering).

> mount state interest in protecting policyholders . . . In these circumstances, we simply cannot see the *conflict.*

SEC, 393 U.S. at 463 (emph. added).

It is not mere coincidence that *SEC* addresses the absence of a "conflict." Most recently, this Court invoked the conflict standard in *U.S. Dept of Treas v. Fabe*, ____ U.S. ____, 113 S. Ct. 2202 (1993), a case in which the parties stipulated that the federal and state laws were in direct conflict (since the federal law placed the United States government in first position as a creditor of an insolvent insurer whereas Ohio law gave policyholders, other expenses and other creditors a higher priority than the United States).

In *Fabe*, this Court did not hold that the direct conflict allowed state law to govern the entire field. This Court did not hold that due to the direct conflict federal law was completely ousted or barred. Rather, this Court explained the effect of the MFA in the following way:

> Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) [of the McCarran-Ferguson Act] reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to *conflicting* federal statutes unless a federal statute specifically requires otherwise.

Fabe, 113 S. Ct. at 2211 (emph. added).

This passage makes at least two important points. First, the MFA allows state law to avoid or be exempt from federal preemption.[14] *Id.* at 2212 (noting that *Group Life &*

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[14]This *exemption from federal preemption* is not the same thing as *reverse field preemption.* Field preemption would allow the states to occupy the entire field by regulating any part of the business of insurance, resulting in complete ouster of federal law from the entire

Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217 (1979), "rejected the notion that such indirect effects are sufficient for a state law to avoid [federal] pre-emption under the McCarran-Ferguson Act"). In other words, the state's avoidance of federal preemption means that the federal and state laws coexist unless they cannot coexist, i.e., a conflict allows the state law to displace the federal law. The Court of Appeals' analysis obeys traditional preemption principles and maximizes the coexistence of federal and state regulations. Hall's analysis invents a new species, a reverse field preemption which has no explicit basis in the case law.

Second, *Fabe* holds that a federal law must yield only if it conflicts with, and *only to the extent* that it conflicts with, a state law whose purpose is the regulation of the business of insurance:

> In the present case . . . there is a *direct conflict* between the federal priority statute and Ohio law . . . therefore, federal law must yield *to the extent* the Ohio statute furthers the interests of policyholders.

Fabe Id. at 2208 (emph. added).

There is substantial case law on the question of "actual conflict." Actual conflict exists "when it is impossible to comply with both state and federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *See English*, 496 U.S. at 79. Actual conflict is synonymous with "irreconcilable conflict." *Silkwood*, 464 U.S. at 256. In areas of coincident federal and state regulation, the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly ex-

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field. Exemption from federal preemption means that state and federal laws each apply to the business of insurance except in the event of a direct conflict.

ists." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960).

Hall appears to argue that any state could ignore long standing preemption principles and define for itself the nature of its preemption in the business of insurance. For example, under this argument, California could explicitly legislate that the only remedies are those in the UIPA (its law regulating the business of insurance) and that federal civil remedies are not available to remedy wrongs in the business of insurance. Even if, for argument's sake, California could expressly preempt all remedies other than those in the UIPA, California has not done so.[15]

Hall suggests that *SEC* was decided, not on the issue of "conflict," but on the distinction that the entities operated in different "*spheres*," i.e., the state protected policyholders and the SEC protected shareholders. (Pet. 10) This distinction breaks down in light of this Court's opinion as quoted above (concerning the absence of a conflict) and its conclusion that:

> [I]t has never been held that state regulation of insurance securities pre-empts federal regulation, on the theory that the federal securities laws would be "superseding" state laws regulating the business of insurance. The fact that Arizona purports to protect the interests of insurance company stockholders does not,

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[15] As explained below, California does not restrict remedies to those remedies in the UIPA. On the one hand, there are no civil remedies in the UIPA and on the other hand, California makes available various remedies for fraud in the business of insurance. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 250 Cal. Rptr. 116, 127, 758 P.2d 58, 68-69 (1988). In addition, civil RICO claims may be filed in California courts. *Cianci v. Superior Court*, 221 Cal. Rptr. 575, 576, 710 P.2d 375, 381 (1985).

> therefore, by itself, render the federal securities laws inapplicable.

SEC, 393 U.S. at 461.

Nonetheless, even under Hall's interpretation, i.e., that *SEC* allowed coexisting regulations only if each was in its own sphere (the SEC's sphere being protection of shareholders and the Insurance Commissioners's sphere being protection of policyholders), the same approach is true here with the federal sphere being protection from criminal racketeering and the state sphere being ratemaking and licensing.[16]

Where there is incomplete displacement of the other body of law, the preemption standard is necessarily the "conflict" standard. *Cal. Fed. S. & L. Ass'n. v. Guerra*, 479 U.S. 272, 281 (1987) and *Cal. Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). The MFA contains two provisions which render its displacement of federal law unquestionably incomplete so that it could not possibly create field preemption — that phrase mentioned above (namely that federal law is displaced only if it "invalidates, impairs or supersedes" state law) and the language that Congress can preempt the states' power to regulate insurance by any law which "specifically relates" to insurance. Since the displacement of federal law is incomplete, the conflict standard necessarily applies.

Logic and language compel the same result. The very language of the MFA does not provide for field or express preemption since the MFA preempts federal law only if the federal law "invalidates, impairs or supersedes" the state

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[16] In discussing *SEC*, Hall acknowledged that federal interference is not barred where it is too "indirect" in light of the importance of the federal action (Pet. 10). Once again, the test is conflict since "interference" necessarily refers to the interplay of federal and state laws, namely whether the federal law conflicts with the state law.

law. The phrase "invalidates, impairs or supersedes" is necessarily descriptive of "conflict."[17] If the MFA were to provide for express preemption, this determination, (of whether the federal law "invalidates, impairs or supersedes" the state law) would not have been included in the MFA.

Since this Court has applied the conflict test in *SEC* and *Fabe*, there should be no doubt that the MFA only applies if federal law conflicts with state law. As noted below, other decisions of this Court show that the difference of remedies do not create an actual conflict between RICO and California law.

B. A Difference In Remedies Is Not A Conflict.

No less than four decisions of this Court show that the Court of Appeals correctly decided that RICO does not conflict with any California law enacted for the purpose of regulating the business of insurance. The law is so clear that review of this case is just not needed.

First, no conflict is created by a difference in remedies between the federal and state laws. In *Silkwood*, this Court rejected the United States' argument that the state punitive damage award (based on radiation safety violations) conflicts with the NRC's authority to impose civil penalties. *Silkwood*, 464 U.S. at 257. Even though the punitive damage award was clearly intended to punish operators for safety

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[17]The words "invalidate," "impair" and "supersede" express the same concept as "conflict," "interfere," "contravene" used in preemption cases. *See, e.g., Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) ("interfere" and "contravene"); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985) ("superseded").

violations, which is a function reserved to the NRC, this Court found no conflict and pointed out that:

> Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

Id.

This Court noted that "tension" may exist since safety regulation is an exclusively federal concern and state punitive damage awards for safety violations may have a policing effect. *Id.* at 256. However, this Court warned that such tension between federal and state law must be tolerated. *Id.* This Court rejected "field preemption" even for a subject as critical as nuclear safety:

> [I]nsofar as damages for radiation injuries is concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an *irreconcilable conflict* between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

Id.

Here, RICO provides for treble damages and attorneys' fees. While California law does not provide treble damages for fraud, it provides for punitive damages (Cal. Civ. Code § 3294; Resp. App. 1a); double damages (Cal. Probate Code § 16249(b); Resp. App. 3a); attorneys' fees in appropriate cases (Cal. Code of Civ. Proc. § 1021; Resp. App. 2a) and fines up to $55,000 (*Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 250 Cal. Rptr. 116, 127, 758 P.2d 58, 68-69 (1988)). As noted above, those differences do not create a

conflict since a damages award does not violate or overturn state law. *Silkwood*, 464 U.S. at 257.

Second, the absence of certain remedies does not imply any intent to reject those remedies. *English*, 496 U.S. at 89; *Silkwood*, 464 U.S. at 251 (absence of federal civil remedies was considered evidence of an intent not to preempt state civil remedies). This Court wrote:

> The District Court also relied on the absence in § 210 [the federal law] of general authorization for the Secretary to award exemplary damages against employers who engage in retaliatory conduct. The District Court concluded, and respondent now argues, that this absence implies a congressional intent to bar a state action, like petitioner's, that permits such an award . . . We believe the District Court and respondent have read too much into Congress' decision not to authorize exemplary damages for most § 210 violations.

English, 496 U.S. at 89.

Even the California Supreme Court agreed that "something more than mere silence should be required before that [legislative] acquiescence is elevated into a species of implied legislation." *Cianci v. Superior Court*, 221 Cal. Rtpr. 575, 586, 710 P.2d 375, 386 (1985). Thus, the silence of the UIPA on the issue of damages must not generate a conclusion that California decided not to allow treble damages and attorneys' fees for broker fraud, especially where California's remedies are set forth in laws other than the UIPA and where California law provides for attorneys' fees, treble damages, double damages and punitive damages.

Third, one forum may "supplement" another forum's law without creating a conflict. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608 (1992), this Court held that state common law claims against cigarette manufactur-

ers were not preempted by federal laws regulating warning labels, stating:

> In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, [Supreme Court citation omitted], or if federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

Cipollone, 505 U.S. at ____, 112 S. Ct. at 2617.

Fourth, no conflict arises merely from additional liabilities or harsher remedies in one forum. In *Cal. v. ARC America Corp.*, 490 U.S. 93, 105 (1989), this Court held that "ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law."

California provides a number of remedies which are not based on the UIPA, the law which the MFA would treat as the "law enacted for the purpose of regulating the business of insurance." Punitive damages may be available for fraud, conversion or other tortious conduct. Cal. Civ. Code § 3294. Double damages may be available for diversion of trust funds. Cal. Probate Code § 16249(b). Rescission and other remedies may be available under equitable claims. Differing legal remedies have always co-existed and Hall cites no authority that a conflict arises from the differences.[18]

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[18]This Court has pointed out that cumulative remedies advance remedial statutes. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983).

C. It Is Immaterial Whether RICO's Remedies Invalidate, Impair Or Supersede Laws *Not* "Enacted For The Purpose Of Regulating The Business Of Insurance."

Here, RICO's remedies could not interfere with the remedies in the UIPA since that law does not contain any civil remedies.

The MFA only applies if RICO invalidates, impairs or supersedes a California law "enacted for the purpose of regulating the business of insurance." If RICO supersedes a law other than one enacted to regulate insurance, the MFA does not apply. It is clear that the UIPA is California's law "enacted for the purpose of regulating the business of insurance." Hall agrees. (Pet. 15-16)

It is also clear that, according to the California Supreme Court, the source in California of civil remedies arising from fraud in the business of insurance is not the UIPA. *Moradi-Shalal*, 250 Cal. Rtpr. at 127, 758 P.2d at 68-69. Rather, civil remedies are based on law other than the UIPA:

> The courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of emotional distress and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing. Punitive damages may be available in actions not arising from contract where fraud, oppression or malice is proved.

Id.

Since the UIPA is silent as to civil remedies and since California permits civil damages and other remedies, RICO's remedies necessarily do not supersede the UIPA, the "law enacted for the purpose of regulating the business of insurance."

D. Other Reasons Support The Court Of Appeals' Decision.

While the MFA is concerned with duplicative federal licensing or taxation based on an expansion of the Commerce Clause, it is a very different thing to bar RICO's protection of citizens from criminal racketeering. RICO's origin is not solely the Commerce Clause and, consistent with this view, criminal prosecution for mail fraud in the business of insurance has not been barred by the MFA. *U.S. v. Sylvanus*, 192 F.2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952).[19]

It is one thing to compare federal and state regulations. It is a very different and awkward thing to compare a citizen's federal remedies with state regulation. Indeed, this Court has consistently rejected limits on citizen remedies based on such comparisons. *See, e.g., Silkwood; English; Cipollone* and *ARC America.*

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[19] *See also Russello v. U.S.*, 464 U.S. 16 (1983) (affirming a RICO conviction for fraudulent receipt of insurance proceeds); *U.S. v. Starnes*, 644 F.2d 673 (7th Cir. 1981), *cert. denied*, 454 U.S. 826 (1981) (affirming a RICO conviction for insurance fraud).

RICO was intended to augment other criminal laws and not limit or be limited by them. *U.S. v. Angelilli*, 660 F.2d 23, 34 (2d Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). RICO has a stronger link to Penal Code § 487 (under which the felons were convicted; Resp. App. 3a, 4a) than to the UIPA. § 487 concerns grand theft and is not a law whose purpose is the regulation of the business of insurance. As this Court noted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987):

> A common-sense view of the word "regulates" would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry.

III.

THE "BUSINESS OF INSURANCE" DOES NOT INCLUDE FRAUD IN TAKING MONEY (A) FOR NONEXISTENT INSURANCE, (B) ON FRAUDULENTLY INFLATED PREMIUMS, AND/OR (C) FOR FALSE CLAIMS.

Hall aserts that the taking of money for fictitious insurance and phony claims are practices which constitute the business of insurance.

First, unless this Court determines that RICO "invalidates, impairs or supersedes" the UIPA, this question is entirely moot because, irrespective of the answer to this question, Merchants can prosecute its RICO claims since they do not conflict with California insurance regulation.

Second, the issue as to whether the challenged practices are the "business of insurance" is so case-specific as to not require review by this Court.

Third, the Court of Appeals here properly invoked and applied the correct factors, set out in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982), to determine whether the challenged practices are the "business of insurance." The Court of Appeals correctly decided that Hall's receipt of monies for phony, nonexistent policies and for phony, nonexistent claims is not the "business of insurance" but the business of crime.[20]

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[20]The state response was by the District Attorney (felony conviction based on Penal Code for grand theft including restitution to victims) rather than by the Insurance Commissioner (no action taken pursuant to the UIPA to help victims).

Indeed, this Court's language in *H.J.* suggests that this type of activity could be the basis for a RICO claim:

> A RICO pattern may surely be established . . . Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would

The Court of Appeals' conclusion tracks statements of this Court, in *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 71 (1959) ("The concept of 'insurance' involves some investment risk-taking on the part of the company") and *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 212 (1979) (underwriting or spreading of risk is "an indispensable characteristic of insurance") and 440 U.S. at 226-7 ("The legislative history makes clear that Congress did not intend the definition of the 'business of insurance' to be broader than its commonly understood meaning").

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be reappearing each month to collect the "premium" that would continue their coverage.

H.J., 492 U.S. at 242.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

DATED: October 2, 1995

Respectfully submitted,

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APPENDIX A

1992 ANNUAL REPORT OF THE DIRECTOR
L. RALPH MECHAM
ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Table C-2A
U.S. District Courts — Civil Cases Commenced by Nature of Suit During the 12 Month Periods Ending September 30, 1988 through 1992

Nature of Suit	1988	1989	1990	1991	1992	Percent Change 1991/1991
* * *						
RICO	941	1,129	1,138	972	897	-7.7
* * *						

California Civil Code § 3294; Availability of exemplary damages

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of the oppression, fraud or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice must

be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

California Code of Civil Procedure § 1021; Attorney fees and costs, generally

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

California Probate Code § 16249(b); Actions and proceedings; wrongful taking, concealing or disposing of trust property/liability.

(b) A person who, in bad faith, has wrongfully taken, concealed, or disposed of property in or belonging to the trust is liable for twice the value of the property, recoverable in an action by a trustee for the benefit of the trust.

California Penal Code § 487; Grand Theft.

Grand theft is theft committed in any of the following cases:

1. When the money, labor or real or personal property taken is of a value exceeding four hundred dollars ($400); provided, that when domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding one hundred dollars ($100); provided, further, that when fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding one hundred dollars ($100); provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates four hundred dollars ($400) or more in any 12 consecutive month period, then the same shall constitute grand theft.

For purposes of establishing that the value of avocados or citrus fruit under this subdivision exceeds one hundred dollars ($100), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft avocados or citrus fruit of the same variety and weight exceeded one hundred dollars ($100) in wholesale value.

2. When the property is taken from the person of another.

3. When the property taken is an automobile, firearm, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow or pig.